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Oral Hearing:
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Milliman & Robertson, Inc.

Serial No. 74/324,490

Robert S. Lipton and Alfred Stapler of Lipton & Stapler for
Milliman & Robertson, Inc.

Linda E. Blohm, Trademark Examining Attorney, Law Office 106
(Mary I. Sparrow, Managing Attorney).

Before Rice, Simms and Hohein, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Milliman & Robertson, Inc. has filed an application to
register the phrase "HEALTH INSURANCE TREND MODEL" for the
following goods and services:¹

¹ Ser. No. 74/324,490, filed on October 25, 1992, which alleges dates of first use of August 21, 1987 for the goods and July 5, 1987 for the services. Applicant also claims ownership of Reg. No. 1,610,876, issued on the Supplemental Register on August 21, 1990, for the mark "HEALTH INSURANCE TREND MODEL" (the words "HEALTH INSURANCE" are disclaimed) for "business services, namely, the monitoring and analysis of trends"; combined affidavit §§8 and 15.

"Periodical publications, consisting of reports, graphs, charts and data pertaining to health insurance trends," in International Class 16;

"Consulting services in the field of health insurance trends and health care cost containment and review," in International Class 35; and

"Educational services, namely, conducting training classes in the field of health care costs containment and review," in International Class 41.

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis that, when used in connection with applicant's goods and services, the phrase "HEALTH INSURANCE TREND MODEL" is merely descriptive of them.²

² Although applicant, in response to the initial refusal to register, stated that "the mark has acquired secondary meaning as a result of its use for more than five (5) years" and accordingly requested "registration under §2(f) of the Trademark Act, 15 U.S.C. 1052(f)," the accompanying declaration from its Chief Executive Officer states only that "the mark ... has been in continuous use as set forth in the ... application". Applicant's claim of acquired distinctiveness, however, was considered "insufficient because the declaration does not [also] allege that applicant's use has been 'substantially exclusive' use in commerce". In addition, it was pointed out that "even if the declaration were adequately worded, the mere fact of five years' use of the mark would be insufficient to establish that the mark has acquired distinctiveness" because, according to the Examining Attorney, "[a]pplicant's mark is very highly descriptive of the goods and services." Applicant, it appears, declined to submit any additional evidence of acquired distinctiveness in light of the Examining Attorney's further indication that "no amount of Section 2(f) evidence would be sufficient to support a finding that HEALTH INSURANCE TREND MODEL is a source-identifying trademark or service mark for goods and services which are, or utilized, a health insurance trend model."

Applicant has appealed. Briefs have been filed and an oral hearing was held.³ We affirm the refusal to register.

It is well settled that a phrase or term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. See *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a phrase or term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the phrase or term describes a significant attribute or idea about them. Moreover, whether a phrase or term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services and the possible significance that the phrase or term would have to the average purchaser of the goods or services because of the manner of its use. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Consequently, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is

³ Counsel for applicant, at the oral hearing, indicated that applicant was no longer pursuing its claim of acquired distinctiveness. Accordingly, and in light of the defect previously noted in the supporting declaration, the claim of acquired distinctiveness will not be given further consideration.

not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

Applicant, while conceding that its goods and services have "some commonality in that they all relate to health care," argues that the Examining Attorney has failed to appreciate the specific differences in each of its various "activities" and how those differences preclude the phrase "HEALTH INSURANCE TREND MODEL" from being merely descriptive thereof. In particular, with respect to its goods, applicant contends that while the terminology "TREND MODEL" in the phrase it seeks to register "conveys the meaning of a theoretical, or hypothetical[,] construct," such phrase as a whole, when applied to periodical publications which consist of reports, graphs, charts and data pertaining to health insurance trends, "does not provide the kind of immediate understanding of the goods which would cause the mark to be considered as being merely descriptive." Such an understanding, applicant insists, would instead "come, if at all, only as the result of imagination exercised by the customer."

With respect to its consulting services in the field of health insurance trends and health care cost containment and review, applicant "submits that all the arguments advanced above in relation to the goods ... also apply, if anything with greater force, to these services". In particular, applicant urges that "the mark itself does not convey the meaning that it applies to services at all, and much less to consulting services specifically"; that "[t]he mark itself also does not convey the meaning that it applies to the 'trends' referenced in the

definition of the ... services, as distinguished from the (theoretical or hypothetical) 'trend model' terminology which forms part of the mark"; and that "the mark conveys no meaning that the services involve 'cost containment and review'."

Finally, as to its educational services of conducting training classes in the field of health care costs containment and review, applicant asserts that "there is such a disconnection between the mark itself and the identified services that the mark could not possibly be regarded as merely descriptive of those services." The phrase "HEALTH INSURANCE TREND MODEL," particularly as applied to educational training classes pertaining to containment and review of health care costs, is at most suggestive of such services, according to applicant, and any doubt with respect thereto should be resolved in its favor.

The Examining Attorney, on the other hand, maintains that such phrase is merely descriptive of "the subject matter of the goods, and the function of the services," in connection with which it is used by applicant. The failure of the identification of the goods and services to include the word "model" therein, the Examining Attorney notes, "serves only to prevent the proposed mark from being subject to a genericness refusal," but it does not preclude a finding of mere descriptiveness.

In support of her contention that the phrase "HEALTH INSURANCE TREND MODEL" is merely descriptive of the goods and services as identified in the application, the Examining Attorney relies in her brief upon dictionary definitions of the words "trend" and "model". Specifically, Webster's New Riverside

University Dictionary (1988) lists "trend" as meaning "1. A general inclination or tendency: DRIFT <a *trend* to smaller cars> 2. A direction of movement: COURSE." The same dictionary also sets forth "model" as connoting, inter alia, "2. A preliminary pattern serving as the plan from which an item not yet constructed will be produced. 3. A tentative description of a theory or system that accounts for all of its known properties." Webster's New World College Dictionary (3rd ed. 1997), we judicially notice,⁴ similarly defines "trend" as signifying "a general or prevailing tendency or course, as of events, a discussion, etc.; drift" and lists "model" as connoting, among other things, "a generalized, hypothetical description, often based on an analogy, used in analyzing or explaining something".

In addition, the Examining Attorney relies upon the manner of use of the phrase "HEALTH INSURANCE TREND MODEL" as shown by the specimens of record. The specimens for the goods appear to include the cover and title page of a February 1989 publication by applicant which is entitled "Health Insurance Trend Model™" and bear the subtitle "Trend Analysis and Forecasts". The publication's table of contents lists, among other topics, "Health Insurance Trend Highlights," "Trend Model Graphs," "Trend Model Data Summary" and "Regional Trends," and

⁴ The Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

also sets forth an "Appendix B - Uses and Implications of the Trend Model." Such appendix, in particular, mentions the following (**emphasis added**):

The "Health Insurance Trend Model™" is a health cost management tool based on historical relationships between the national economy and national **health care trends**. It can be used, along with other available information, in anticipating future **trends**. Special or unusual circumstances that may change in the future must be considered separately from the Trend Model since these would generally not be anticipated by the **model**.

The Trend Model is intended to provide general indications of the direction and relative change of **trends** in the near future. The **Model** is not intended, and cannot be expected, to provide a determination of exact **trends**. Furthermore, the more distant the projection period extends into the future, the more uncertain are the results.

The actual **trends** will vary according to geographic location, type and mix of business, underwriting, demographics, reimbursement mechanisms, **health** care cost controls and movement away from historical relationships, etc.

Because of these considerations, actual **health insurance trends** should generally be expected to average 1 to 2% higher than the Trend Model, independent of deductible leveraging.

....

Limited Warranty. M&R warrants that it has exercised reasonable care in compiling data and developing the **trends** and forecasts incorporated in the Health Trend Model™ While M&R believes that the Health Insurance Trend Model™ is accurate with indications of **health insurance trends**, under the terms

defined in the User's Guide of the Health Insurance Trend Model,TM M&R does not make any warranty to that effect.

The several different specimens submitted with respect to applicant's consulting services in the field of health insurance trends and health care cost containment and review appear to include the same ones as those furnished as specimens in connection with its educational services of conducting training classes in the field of health care costs containment and review.⁵ These dual-purpose specimens, as stated by applicant in its August 11, 1993 response, consist of "a one page informational sheet entitled 'Health Insurance Trend Model'" and are subtitled "Trend Analysis and Forecast" and "History and User's Guide".⁶ Such specimens refer to applicant's "Trend Model

⁵ The other specimens submitted with respect to applicant's consulting services consist of copies of the October 1988 and July 1992 issues of applicant's "Health Cost Index Report," which states on the front page of each that such publication "is a quarterly newsletter monitoring health insurance cost trends". The October 1988 edition, which appears to be the premier issue, contains the following explanation (**emphasis added**):

The Health Insurance Trend ModelTM is a **health** cost management tool based on historical relationships between the national economy and national **health** care **trends**. It can be used, along with all other available information, in anticipating future **trends**. The **model** is intended to provide general indications of the direction and relative change of **trends** in the near future and should be viewed as the underlying force behind a group's **trends**.

Such issue also states that "The Health Insurance Trend ModelTM uses two scenarios to project **health insurance trends** forward" and the July 1992 issue likewise indicates that such model "uses two scenarios in forecasting **health insurance trends**" (**emphasis added**). In addition, both the October 1988 and July 1992 issues contain discussions of "REGIONAL HEALTH INSURANCE TRENDS".

⁶ Applicant furnished such specimens in response to the contention that the originally filed specimens referred only to a periodical publication produced by applicant. We observe, however, that under

package"⁷ as including "[s]ubstantial training, consulting, and support, including an annual on site visit," and describe what applicant provides as follows (**emphasis added**):

the heading "Health Services," the original specimens state that "[t]he ability to anticipate trend changes is an important tool in managing financial resources and that "[t]he M&R consultant uses the following tools to anticipate trends:"

ECOTRAC

A package of various economic indicators which portrays economic data in graphical form. Since the cyclical nature of **health insurance trends** mirrors trends in the economy, ECOTRAC aids in analyzing recent trend patterns and developing future trend projections.

HEALTH INSURANCE TREND MODEL

The Health Insurance Trend Model was developed for clients who lack the historical data to define a **trend model** based on their own experience. Combining ... the medical components of the Consumer Price Index, and several national utilization indices, the Model follows the pattern of actual fee-for-service **health insurance trends**. **Trend** projections using various economic scenarios are developed by applying sophisticated **modelling** techniques, to aid clients in determining the future direction of their own **trends**.

TREND MODELLING

For clients who have maintained an historical data base, a **model** based on their own **trends** can be derived. The objective is to relate actual historical **trends** to national economic variables in order to determine the nature of any relationship between the economy and their own **trends**. By identifying these leading indicators, the **model** will allow projection of **trends** into future periods.

(**Emphasis added.**)

⁷ It appears that such "package" is actually a computer program or software package developed by applicant inasmuch as the specimens state that "[i]f you are interested in leasing the Health Insurance Trend Model, the completion of a confidentiality and licensing agreement is required." It further appears, however, that applicant, in connection therewith, provides separately available consulting and educational services in addition to various periodical publications devoted to use of its software.

One of the key assumptions crucial to the successful management of **health** care risks is the selection of trend assumptions. **Trends** are affected by a number of factors and cannot be reliably predicted without a sizeable [sic] historical data base. Therefore, few **insurers**, benefit plan sponsors, or other **health** care risk managers have developed strong **trend** projection capability.

The Health Insurance Trend Model™ (HITM) is an important tool in **health** care financial management because it allows a user to anticipate the **trends** of net claims costs without the benefit of its own extensive historical data. [T]he Health Insurance Trend Model reflects the underlying pattern of revenue **trends** that **health** care providers are generating from the non-Medicare population. We refer to this as the force of **health insurance trends**. The HITM is capable of adjusting for the leverage effect of deductibles, out-of-pocket coinsurance limits, and other benefit differences that effect **trends**.

Finally, the record also contains excerpts from two searches of the "NEXIS" data base which, as illustrated by the examples reproduced below, show that the term "trend model" is a term commonly used in various scientific, business and financial fields, including insurance (**emphasis added**):

This step-wise **trend model** of economic growth is related to the breaking-trend work of Perron ... and Rappaport and Reichlin -- Southern Economic Journal, April 1994, at 977 (article headlined "Business cycles, trends, and random walks in macroeconomic time series");

[M]odels are listed in Table Two, and are grouped into categories of simple time

series models, simple smoothing models, and linear **trend models**. -- Business Credit, October 1993, at 14 (article headlined "Issues in forecasting company liquidity");

[One way of] forecasting claim costs is to develop separate trend factors for frequency and severity using simple linear or exponential time **trend models**.

....

The time **trend models** rely exclusively on claim cost data and are very similar to the prevailing actuarial methods. -- Journal of Risk and Insurance, September 1993, at 429 (article headlined "Fuzzy trends in property-liability insurance claim costs");

[D]evoted readers ... pay him 2% a year to move their money in and out of stock funds according to his **trend model**. -- Forbes, August 30, 1993, at 104;

Intermediate and long-term **trend models** are still mildly positive, and prices failed to "satisfy" their short-term cycle top -- Investor's Business Daily, May 20, 1993, at 23;

The problem is that the most commonly used **trend model** uses data from the past to predict the behavior of temperature in the future -- Energy Daily, July 28, 1992

(article headlined "Mathematicians Question Significance Of Global Warming Trend");

Joe Kalish, Ned Davis Research: We cut the duration of our bonds by 5%, but the duration of our bond portfolio is still 15% above its benchmark's duration. We shortened because a couple of our **trend models** flashed sell signals. -- BondWeek, December 9, 1991, at 15;

Ford uses a complex earnings **trend model** that identifies companies whose earnings have accelerated over the preceding four quarters -- regardless of whether they are classic

high-growth companies, or cyclical --
Financial World, January 8, 1991, at 67;

[T]he **trend model** projects linear growth. This means that the amount of increase (or decrease) is constant each time period. This is the most common pattern, but you may see others. For example, the growth for new products is often exponential. The **trend model** will produce conservative forecasts that lag behind exponential growth. -- Lotus, March 1987; and

[With] changing age structure in the near-retirement population during the seventies, both period and age effects were combined into a **trend model** to which the time-series and individual data were separately fitted. . . . -- Social Security Bulletin, February 1987 (article headlined "Recent trends in health near the age of retirement: new findings from the health interview survey).

It is our view that, when applied to applicant's goods and services, the phrase "HEALTH INSURANCE TREND MODEL" immediately describes, without conjecture or speculation, the principal subject matter featured in connection therewith. Applicant provides periodical publications, consisting of reports, graphs, charts and data, which pertain to health insurance trends; it renders consulting services in the field of health insurance trends and health care cost containment and review; and it offers educational services which involve the conducting of training classes in the field of health care costs containment and review. As the specimens of use make clear, all of these goods and services have, as their focal point or chief characteristic, a health insurance trend model developed by applicant for use by its customers in forecasting or projecting

health insurance trends as an aid in the review and containment of health care costs.

To hospital administrators and insurance brokers, who would no doubt be the principal purchasers and users of applicant's goods and services and would be familiar with the terms "trend," "model" and "trend model" as they pertain to models for prognosticating future health care costs, including trends pertaining to health insurance expenses, there is nothing in the phrase "HEALTH INSURANCE TREND MODEL" which is redundant, incongruous, peculiar, indefinite or susceptible to multiple connotations, nor would any imagination, cogitation or gathering of further information be necessary in order for such persons to perceive precisely the merely descriptive significance of such phrase as it relates to the principal subject matter of applicant's goods and services. Plainly, as shown by the "NEXIS" excerpts and the dictionary definitions, both actual and prospective customers of applicant's goods and services would readily understand that, when joined to form the phrase "HEALTH INSURANCE TREND MODEL," the individual words or component terms thereof have a meaning identical to the meaning which ordinary usage would ascribe thereto in combination. See, e.g., *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987). Any periodical publications relating to health insurance trends, as well as any consulting services which are directed to the field of health insurance trends and health care cost containment and review, and any educational services which consist of conducting training classes in the field of health

care costs containment and review, which feature as the basic subject matter thereof a trend model of health insurance costs is aptly described by the phrase "HEALTH INSURANCE TREND MODEL".⁸ The fact that applicant may be the first to use such phrase in connection with the particular goods and services set forth in the application is, however, simply not dispositive where, as here, the phrase unequivocally projects a merely descriptive connotation. See *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973). Clearly, when applicant's knowledgeable and sophisticated customers, who are concerned with the review and containment of health care costs, including health insurance, view the phrase "HEALTH INSURANCE TREND MODEL" in the context of the respective specimens for applicant's goods and services, they would readily understand that, in each instance, the principal or featured subject matter of its periodical publications, consulting services and training courses is a health insurance trend model for use in systematically analyzing and forecasting patterns, tendencies or directions in health care insurance costs.

Accordingly, because in the case of each of applicant's goods and services the phrase "HEALTH INSURANCE TREND MODEL" conveys forthwith the subject matter to which the goods and services chiefly pertain, namely, a trend model for health insurance costs, such phrase is merely descriptive thereof within the meaning of the statute. See, e.g., *In re Engineering Systems*

⁸ The same is likewise true, as evidenced by applicant's Supplemental Register registration, of such phrase with respect to applicant's "business services, namely, the monitoring and analysis of trends".

Corp., 2 USPQ2d 1075, 1077 (TTAB 1986) [mark "DESIGN GRAPHIX" for "computer programs" held "merely descriptive ... in that it immediately informs prospective purchasers that applicant's programs are graphics programs used for design purposes, that is, that they may be used to generate a graphic representation of a design"].

Decision: The refusal under Section 2(e)(1) is affirmed.

J. E. Rice

R. L. Simms

G. D. Hohein
Administrative Trademark Judges,
Trademark Trial and Appeal Board